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MARIA CHIN ABDULLAH v. DATUK DR HJ ZULKIFLI MOHAMAD AL-BAKRI MENTERI DI JABATAN PERDANA MENTERI (HAL EHWAL AGAMA ISLAM) & ORS

HIGH COURT MALAYA, KUALA LUMPUR
WAN AHMAD FARID SALLEH J
B [JUDICIAL REVIEW NO: WA-25-73-03-2021]
3 OCTOBER 2022

Abstract – *When a citizen's constitutional right is at stake and he or she comes to court seeking reliefs, the court cannot and will not stand idly by. In this case, when the applicant had adduced enough materials in arguing that the decision of the Syariah Court in granting leave to commence contempt proceedings against her could be tainted with procedural impropriety and irrationality, and that there were serious questions of law to be determined, an application for judicial review is not frivolous, neither is it premature.*

ADMINISTRATIVE LAW: *Judicial review – Application for – Challenge against decision of Syariah Court in granting leave to commence contempt proceedings against applicant – Whether application involved interpretation of s. 229 of Syariah Court Civil Procedure (Federal Territories) Act 1988 and O. 52 of Rules of Court 2012 – Whether application for judicial review offended art. 121(1A) of Federal Constitution – Whether contempt proceedings tainted with procedural impropriety and irrationality – Whether there were serious questions of law to be determined – Whether application premature*

The applicant, a member of Parliament, came to know from a media report that a Syariah High Court Judge ('Syariah Court') had granted leave ('leave order') to one SM Faisal Tan Sri SM Nasimuddin Kamal ('SM Faisal') to commence contempt proceedings against the applicant. The applicant was eventually served with the cause papers by the solicitors acting for SM Faisal, almost three months since the leave order was granted. The applicants in the contempt proceedings at the Syariah Court ('contempt proceedings') were SM Faisal and one Puan Sri Zaleha Ismail. The Syariah Court also ordered the notice to show cause and the leave order to be served personally on the applicant. The contempt application was purportedly filed under s. 229(3) of the Syariah Court Civil Procedure (Federal Territories) Act 1988 ('SCCPA') and O. 52 of the Rules of Court 2012 ('ROC'). On numerous occasions, the applicant attempted to challenge the leave order and notice to show cause at the Syariah Court, including filing a review application at the Syariah Appeal Court, but to no avail. It was the applicant's position that the Syariah Court had wrongfully granted the leave order and issued the notice

to show cause against the applicant. According to the applicant, s. 229 of the SCCPA only vests the exclusive jurisdiction to commence contempt proceedings to the Syariah Court and not to a private individual. The main thrust of the applicant's complaint was that there was no enabling provision in the SCCPA that allowed the importation of O. 52 of the ROC to the committal proceedings at the Syariah Court. Aggrieved by the purported irregularities in the contempt proceedings, the applicant lodged a complaint to the putative third respondent and the then Minister in Charge of Islamic Affairs ('Minister') *vide* a letter ('impugned letter'). Unfortunately, the Minister and the putative third respondent failed to respond to the impugned letter. Aggrieved, the applicant, commenced this application for leave for judicial review to challenge, *inter alia*, the following: (i) the decision of the Syariah Court in granting the leave order and the notice to show cause; (ii) the decision of the Syariah Appeal Court in dismissing the applicant's application for an extension of time to file for a review of the leave order and the notice to show cause which the applicant said was improperly granted by the Syariah Court; and (iii) the decision or otherwise omission made by the Minister and the putative third respondent in allegedly failing to discharge their respective duties by responding to the impugned letter. The applicant submitted that this judicial review application involved, *inter alia*, the interpretation of s. 229 of the SCCPA and O. 52 of the ROC, both of which written Federal laws and the power to interpret Federal law lay exclusively within the jurisdiction of the civil courts and not by the Syariah Court. The applicant also raised the issue of whether the omission of the third respondent to respond to the impugned letter amounted to a breach of arts. 5, 8 and 10 of the Federal Constitution ('FC') to the extent that the fundamental liberties guaranteed to the applicant had been violated. The Attorney General ('AG'), in objecting this application for leave, submitted (i) the jurisdictional issue. The Syariah Court's jurisdiction and power to commence contempt proceedings and to impose punishment for contempt against any individual are provided under s. 229 of the SCCPA; and (ii) the application for leave for judicial review was premature.

Held (granting leave for applicant to commence judicial review):

(1) The applicant was challenging the jurisdiction of the Syariah Court to issue the leave order and the notice to show cause purportedly made under s. 229 of the SCCPA. The contempt proceedings under s. 229 of the SCCPA could not, by any legal imagination, be construed as within the ambit of the precepts of Islam. This application for judicial review did not offend art. 121(1A) of the FC. (paras 35-37)

(2) The applicant had come to this court complaining that her rights under art. 5 of the FC, that no person shall be deprived of his life or personal liberty save in accordance with law, was at stake. The applicant said the

A contempt proceedings, taken as a whole, were an affront to her liberty as the proceedings were based on s. 229 of the SCPA, which according to her, was unconstitutional. When a citizen's constitutional right is at stake and he or she comes to the court seeking reliefs, it does no longer matter whether she is a Member of Parliament or a street hawker. The B court cannot and will not stand idly by. The applicant had adduced enough material in arguing that the contempt proceedings could be tainted with procedural impropriety and irrationality. Whether she is right will not be decided at this stage. That is for the substantive stage. (paras 40 & 41)

C **(3)** The applicant had shown to this court that there were serious questions of law to be determined. Whether s. 229 of the SCPA could be initiated by a private individual or the Syariah Court or whether the Syariah Court is seized with the jurisdiction to interpret s. 229 of the SCPA in light of art. 5 of the FC are serious questions of law. It showed that this D application for leave for judicial review was not frivolous. That was sufficient to warrant the grant of leave in view of the low threshold required under the law. (para 42)

(4) The other issue for the determination of this court was whether the application for leave was premature since, at least at this stage, the E committal proceedings were inchoate. The applicant's argument was the whole committal proceedings were void *ab initio.* She need not wait for further steps to be taken by the Syariah Court. She was adversely affected within the meaning of O. 53 r. 2(4) of the ROC as soon as the Syariah Court issued the leave order and the notice to show cause. Her F only avenue is to challenge the legality of the proceedings at the Syariah Court by judicial review now or risk herself being committed to prison. That would be too little too late. This application for judicial review was certainly not premature. (paras 43 & 44)

Case(s) referred to:

G *Abdul Rahman Abdullah Munir & Ors v. Datuk Bandar Kuala Lumpur & Anor [2008] 6 CLJ 805 CA* ***(refd)***

Cheah Foong Chiew v. Lembaga Jurutera Malaysia [1999] 3 CLJ 242 CA ***(refd)***

Dato' Seri Ir Hj Mohammad Nizar Jamaluddin lwn. Dato' Dr Zambry Abd Kadir [2009] 5 MLJ 108 HC ***(refd)***

Iki Putra Mubarrak v. Kerajaan Negeri Selangor & Anor [2021] 3 CLJ 465 FC ***(refd)***

H *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals [2018] 3 CLJ 145 FC* ***(refd)***

M & W Zander (M) Sdn Bhd v. Director General Of Inland Revenue [2005] 6 CLJ 336 HC ***(refd)***

Zaina Abidin Hamid & Ors v. Kerajaan Malaysia & Ors [2009] 6 CLJ 683 CA ***(refd)***

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Legislation referred to:
Federal Constitution, arts. 4(1), 5, 8, 10, 121(1), (1A)
Rules of Court 2012, O. 52 r. 2, O. 53 r. 2(4)
Syariah Court Civil Procedure (Federal Territories) Act 1998, s. 229(3)

For the applicant - Rosli Dahlan, Kong Xin Qing & Zeti Zulfah; M/s Nurul Hafidzah & Assocs
For the 1st & 3rd respondents - Ahmad Hanir Hambaly & Liyana Muhammad Fuad; AG' Chambers
For the 2nd respondent - Zainul Rijal Abu Bakar; M/s Chambers Of Zainul Rijal
For the proposed intervener - Sulaiman Abdullah; M/s Izzah Shakirah & Umi Kartini

Reported by Suhainah Wahiduddin

JUDGMENT

Wan Ahmad Farid Salleh J:

[1] Sometimes in October 2019, the applicant came to know from the media report that a Syariah High Court Judge, Federal Territory ("the Syariah Court"), had granted leave ("leave order") to one SM Faisal bin Tan Sri SM Nasimuddin Kamal ("SM Faisal") to commence contempt proceedings against the applicant at the Syariah Court.

[2] The applicant, who is a member of Parliament, was unaware of any contempt proceedings initiated against her. According to her, despite the wide media coverage, she was never served with the leave order purportedly issued by the Syariah Court.

[3] Curious, the applicant wrote to the Syariah Court Judge on 29 November 2019 to inquire whether there was any such leave order against her. The applicant also requested that the relevant cause papers, if any, be served on her to enable her to seek legal advice.

[4] The applicant was eventually served with the cause papers by the solicitors acting for SM Faisal, Messrs Akberdin & Co, on 10 December 2019, almost three months since the leave order was granted. The applicants in the contempt proceedings at the Syariah Court ("the contempt proceedings") were SM Faisal and one Puan Sri Zaleha binti Ismail.

[5] The leave order, which was dated 14 October 2019 *inter alia*, states as follows (where "respondent" refers to the applicant):

> Mahkamah memerintahkan satu Notis Menunjukkan Sebab hendaklah dikeluarkan dan diserahkan kepada Responden untuk membela diri daripada dikenakan hukuman kerana melakukan perbuatan sebagai penghinaan Mahkamah pada 05.09.2019 melalui penerbitan artikel yang bertajuk 05 Sep Injustice Against Muslim Women Still Exist in Legal System' melalui laman sesawang Responden di ....

A The Syariah Court also ordered the notice to show cause and the leave order to be served personally on the applicant.

[6] The contempt application was purportedly filed under s. 229(3) of the Syariah Court Civil Procedure (Federal Territories) Act 1998 ("SCPA") and O. 52 of the Rules of Court 2012. Section 229(3) of the SCPA provides:

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> In the case of contempt committed outside Court, notice to show cause why an action or proceedings should not be taken against him shall be served personally on the person alleged to have committed such contempt.

C **[7]** On numerous occasions, the applicant attempted to challenge the leave order and notice to show cause at the Syariah Court, including filing a review application at the Syariah Appeal Court, but to no avail.

[8] It is the applicant's position that the Syariah Court had wrongfully granted the leave order and issued the notice to show cause against the D applicant. According to the applicant, s. 229 of the SCPA only vests the exclusive jurisdiction to commence contempt proceedings to the Syariah Court and not to a private individual. The main thrust of the applicant's complaint, as I can see it, is that there is no enabling provision in the SCPA that allows the importation of O. 52 of the ROC to the committal proceedings E at the Syariah Court.

[9] Aggrieved by the purported irregularities in the contempt proceedings, the applicant lodged a complaint to the putative third respondent and the then Minister in Charge of Islamic Affairs ("Minister") *vide* a letter dated 15 January 2021 ("the impugned letter"). Unfortunately, the Minister and F the putative third respondent failed to respond to the impugned letter.

[10] Aggrieved, the applicant, commenced this application for leave for judicial review to challenge *inter alia* the following:

(i) The decision of the Syariah Court in granting the leave order and the notice to show cause. G

(ii) The decision of the Syariah Appeal Court on 4 December 2020 in dismissing the applicant's application for an extension of time to file for a review of the leave order and the notice to show cause which the applicant said was improperly granted by the Syariah Court on H 14 October 2019.

(iii) The decision or otherwise omission made by the Minister and the putative third respondent in allegedly failing to discharge their respective duties by responding to the impugned letter.

I **[11]** There is another application in encl. 6 filed by SM Faisal for an order that he be allowed to intervene in this judicial review proceeding.

[12] When the matter came up for hearing on 26 May 2022, learned counsel for the proposed intervener invited this court to hear and dispose of the application in encl. 6 first. This, I declined. My reasons are these. First, this judicial application is still at the leave stage and is heard on an *ex parte* basis.

[13] The presence of the representative from the Attorney General's Chambers ("AGC") is because the Attorney General ("AG") is objecting to the application for leave. The AG is entitled to object since the AG is constitutionally regarded as the guardian of public rights. The presence of the AG or his representative is to assist the court in filtering the judicial review applications which are groundless or hopeless at an early stage; *Dato' Seri Ir Hj Mohammad Nizar Jamaluddin lwn. Dato' Dr Zambry Abd Kadir* [2009] 5 MLJ 108.

[14] However, the presence of the AG or his representative does not convert an *ex parte* hearing into *inter partes*.

[15] Secondly, in the event that the leave is refused, the question of the right to intervene by SM Faisal or any party for that matter does no longer arise since there is no lis for the court to further deliberate and determine any more.

[16] For the aforesaid reasons, I directed for the leave application to be heard and disposed of first. Since Datuk Sulaiman Abdullah, who represented the proposed intervener, was already in court, I asked him to stay to assist the court as an *amicus curiae*.

The Leave Application For Judicial Review

[17] The application is supported by the affidavit of the applicant in encl. 2 ("AIS-2).

[18] Learned counsel for the applicant submitted that this judicial review application involves, *inter alia*, the interpretation of s. 229 of the SCPA and O. 52 of the ROC, both of which are written federal laws. According to learned counsel, the power to interpret federal law lies exclusively within the jurisdiction of the civil courts and not by the Syariah court.

[19] The applicant also raised the issue of whether the omission of the third respondent to respond to the impugned letter amounts to a breach of arts. 5, 8 and 10 of the Federal Constitution to the extent that the fundamental liberties guaranteed to the applicant have been violated.

[20] My attention was then drawn to the judgment of the Court of Appeal *Zaina Abidin Hamid & Ors v. Kerajaan Malaysia & Ors* [2009] 6 CLJ 683 CA. The case carries the proposition that while art. 121(1A) of the Federal

A Constitution has taken away the jurisdiction of the civil courts in respect of matters within the jurisdiction of the Syariah Courts, the civil courts retain the jurisdiction to interpret the Federal Constitution *vis-a-vis* other written laws.

B **[21]** In the circumstances, learned counsel submitted that the Syariah Court is not seized with the jurisdiction to interpret federal laws such as the SCPA and the ROC.

[22] The other aspect of the applicant's contention is that there are serious and arguable grounds that merit the granting of leave. In refusing to respond C to the impugned letter and take the appropriate action, learned counsel for the applicant argued that the third respondent had acted in a manner that contravened the SCPA, ROC and Federal Constitution.

[23] Learned counsel for the applicant, in relying on the judgment of Zainun Ali FCJ in *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak* D *& Ors And Other Appeals* [2018] 3 CLJ 145 FC, submitted that if an exercise of power under a statute exceeds the four corners of that statute, it would be *ultra vires* and a court of law must be able to hold it as such.

The Attorney General's Objection

E **[24]** The AG is objecting to this application for leave.

[25] The grounds of the objections can be summarised as follows:

(i) The jurisdictional issue. The Syariah Court's jurisdiction and power to commence contempt proceedings and to impose punishment for contempt against any individual are provided under s. 229 of the SCPA.

F (ii) The application for leave for judicial review is premature.

On The Question Of Jurisdiction

[26] The learned Senior Federal Counsel submitted that the Syariah Court and the Syariah Appeal Court had exercised their respective judicial power G and discretion within the jurisdiction given to it under the SCPA. By virtue of art. 121(1A) of the Federal Constitution, this court, being a civil court, has no jurisdiction to question or otherwise interfere with the orders made by Syariah Courts.

H **[27]** According to the learned SFC, any attempt by a civil court to intervene with an order of the Syariah Court would amount to an abuse of process.

Judicial Review Is Premature

I **[28]** The learned SFC submitted that the application for leave for judicial review is premature as the notice to show cause is not a "decision" amenable to judicial review. The learned SFC contended that to invoke the court's power in a judicial review application, there must be subject matter for the court to review – in this case, a decision made by the decision maker.

[29] If there is no decision to be impugned, as in this case, the learned SFC argued that there is nothing for this court to review; see *Abdul Rahman Abdullah Munir & Ors v. Datuk Bandar Kuala Lumpur & Anor* [2008] 6 CLJ 805. Applying the proposition to the facts of the case, the learned SFC submitted that the notice to show cause, by virtue of the leave order, does not conclusively determine the rights of the applicant. The applicant could not be said to be adversely affected by the notice to show cause within the meaning of O. 53 r. 2(4) of the ROC.

[30] The notice to show cause *inter alia* states as follows:

> ... untuk menunjukkan sebab dan/atau membela diri daripada dikenakan hukuman kerana melakukan perbuatan sebagai penghinaan Mahkamah.

According to the learned SFC, the "decision" of the Syariah Court to issue the notice to show cause is only the first step of the committal proceedings. There are other steps to make the decision "complete". The learned SFC contended that the requirement for there to be a decision or at the very least, a sub-decision of some sort or the lack of it goes to the very foundation or basis of the application for judicial review under O. 53 of the ROC. He relied on *M & W Zander (M) Sdn Bhd v. Director General Of Inland Revenue* [2005] 6 CLJ 336.

[31] The learned SFC urged me to refuse the application for leave. He contended that to allow leave at this stage would hinder the Syariah Court from performing its judicial function under the written law. Any grant of leave would lead to a fragmentation of the decision-making process, which should not be allowed since it will impair the efficient administration of public authorities.

[32] It is, therefore, the contention of the learned SFC that the decision to issue the notice to show cause did effectively and definitively dispose of the contempt proceedings against the applicant.

[33] Under the circumstances, the learned SFC submitted that it would be wrong for this court to intervene at this stage as it would be tantamount to restraining the Syariah Court from hearing the applicant's defence at the show cause stage as this would pre-empt the Syariah Court's right under the law to adjudicate the matter effectively and definitively; see *Cheah Foong Chiew v. Lembaga Jurutera Malaysia* [1999] 3 CLJ 242; [1993] 3 MLJ 110 CA.

[34] For the aforesaid reasons, although the threshold for leave is low, the learned SFC contended that the applicant has failed to cross this low threshold. In short, according to the learned SFC, the applicant has failed to demonstrate the existence of a *prima facie* case that warranted the grant of leave.

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The Analysis

[35] Let me begin by putting things into perspective. Lest we miss the wood for the trees, by initiating this application for leave for judicial review, the applicant is not challenging any part of the Islamic law that falls within the Syariah Courts' jurisdiction. The applicant is challenging the jurisdiction
B of the Syariah Court to issue the leave order and the notice to show cause purportedly made under s. 229 of the SCPA.

[36] The contempt proceedings under s. 229 of the SCPA cannot by any legal imagination be construed as within the ambit of the precepts of Islam.

C **[37]** In my considered view, this application for leave for judicial review does not offend art. 121(1A) of the Federal Constitution, which provides as follows:

> The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.

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The Federal Court in *Indira Ghandi* was of the view that art. 121(1A) must be interpreted against the background of the foundational principles and other provisions in the Federal Constitution. Article 121(1A) should not be dismembered and then interpreted literally and in isolation of, but construed together with, art. 121(1) for a construction consistent with the smooth
E working of the system. Zainun Ali FCJ then observed:

> Thus the amendment inserting cl. (1A) in art 121 does not oust the jurisdiction of the civil courts nor does it confer judicial power on the Syariah Courts.

F **[38]** In *Iki Putra Mubarrak v. Kerajaan Negeri Selangor & Anor* [2021] 3 CLJ 465; [2021] 2 MLJ 323 FC, Tengku Maimun CJ, in delivering the majority judgment of the Court reiterated the proposition in *Indira Ghandi* and held that in all cases, the civil superior courts retained supervisory jurisdiction which was inherent in their function under arts. 4(1) and 121(1) of the Federal Constitution.

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[39] In the light of *Indira Ghandi* and *Iki Putra*, both of which are pronouncements made by the highest judicial authority, I cannot, with respect, agree with the learned SFC that the exercise of the supervisory jurisdiction of this court on the leave order and notice to show cause would
H amount to an abuse of process.

[40] The applicant has come to this court complaining that her rights under art. 5 of the Federal Constitution that no person shall be deprived of his life or personal liberty save in accordance with law is at stake. The applicant says the contempt proceedings, taken as a whole, are an affront to her liberty as
I the proceedings were based on s. 229 of the SCPA, which according to her, is unconstitutional.

[41] When a citizen's constitutional right is at stake and he or she comes to the court seeking reliefs, it does no longer matter whether she is a member of Parliament or a street hawker. The court cannot and will not stand idly by. The applicant has adduced enough material in arguing that the contempt proceedings could be tainted with procedural impropriety and irrationality. Whether she is right will not be decided at this stage. That is for the substantive stage.

[42] What is pertinent at this leave stage is that the applicant has shown to this court that there are serious questions of law to be determined. Whether s. 229 of the SCPA can be initiated by a private individual or the Syariah Court or whether the Syariah Court is seized with the jurisdiction to interpret s. 229 of the SCPA in the light of art. 5 of the Federal Constitution are serious questions of law. It shows that this application for leave for judicial review is not frivolous. That is sufficient to warrant the grant of leave in view of the low threshold required under the law.

[43] The other issue for the determination of this court is whether the application for leave is premature since, at least at this stage, the committal proceedings are inchoate. With respect, the applicant's argument is the whole committal proceedings were void *ab initio*. She need not wait for further steps to be taken by the Syariah Court. She is adversely affected within the meaning of O. 53 r. 2(4) of the ROC as soon as the Syariah Court issued the leave order and the notice to show cause. Her only avenue is to challenge the legality of the proceedings at the Shariah Court by judicial review now or risk herself being committed to prison. That would be too little too late.

[44] This application for judicial review is certainly not premature.

Findings

[45] For the aforesaid reasons, my findings are as follows:

(i) Leave is hereby granted for the applicant to commence judicial review against the respondents.

(ii) I further order for an interim stay to be granted against the committal proceedings at the Syariah Courts.

(iii) I also further order that the respondents are at liberty to file an application to set aside the interim order of stay pending the disposal of the substantive hearing of this application for judicial review.

(iv) I will now fix the date for the hearing for encl. 6.

(v) Costs shall be in the cause.